IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHARON BINGHAM MATTHEWS	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH S. APFEL, Commissioner of the Social Security Administration	:	NO. 98-1125

MEMORANDUM AND ORDER

BECHTLE, J. DECEMBER , 1999

Presently before the court are plaintiff Sharon Bingham Matthews' ("Plaintiff") Objections to the Magistrate Judge's Report and Recommendation. For the reasons set forth below, the court will approve and adopt the Report and Recommendation.

I. BACKGROUND

This is a judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying Plaintiff's claim for supplemental security income ("SSI") and disability insurance ("DI") benefits.

Plaintiff was born on May 29, 1949. (R. 83.) Plaintiff has had hearing loss since the age of five. (R. 23.) At the age of nineteen, she suffered an Achilles tendon injury to her right leg that never healed properly. Id. As a result, Plaintiff suffers from right foot drop and limps. Id. Plaintiff attended high school until she was 16 years old. (R. 136.) When she was 16,

she attended a trade school from which she received a certificate indicating that she completed the twelfth grade. (R. 59, 111 & 135-37.) Plaintiff's past work experience was as a teacher's aide and hospital worker. (R. 22-23 & 226-27.) Treating and examining physicians agree that Plaintiff should not stand for prolonged periods and that she should not work in a noisy environment. (R. 23 & 28.)

Plaintiff filed an application for DI and SSI, alleging a disability that began December 9, 1991, when Plaintiff was 42 years old. (R. 21 & 83.) Plaintiff's claim was denied initially and upon reconsideration. A hearing was held before an Administrative Law Judge ("ALJ") on September 21, 1994. On April 21, 1995, the ALJ issued a decision wherein he determined that Plaintiff was not disabled. Plaintiff sought review of the ALJ's decision by the Appeals Council. The Appeals Council granted Plaintiff's request for review and remanded the case to the ALJ. On July 16, 1996, a second hearing was held before a different ALJ. On April 21, 1997, this ALJ determined that Plaintiff was not disabled. Plaintiff again sought review of the ALJ's decision, and raised additional evidence in the form a vocational aptitude test. (R. 6.) The additional evidence was not before the ALJ, but was made part of the record by the Appeals Council. (R. 8.) On January 7, 1998, the Appeals Council determined that the additional evidence did not provide a basis for changing the

ALJ's decision and declined Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. On September 14, 1999, United States Magistrate Judge Diane M. Welsh ("Magistrate Judge") issued a Report and Recommendation finding that substantial evidence existed to support the ALJ's finding. On October 26, 1999, Plaintiff filed Objections to the Magistrate Judge's Report and Recommendation. On December 14, 1999, the Commissioner filed a Response to Plaintiff's Objections.

II. LEGAL STANDARD

Judicial review of administrative decisions is limited. The court may not re-weigh the evidence. The court determines only whether the Commissioner's decision is supported by substantial evidence. Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987). Findings of fact made by an ALJ must be accepted as conclusive, provided that they are supported by substantial evidence. 42 U.S.C. § 405(g). In reviewing a decision of the ALJ, the court "need[s] from the ALJ not only an expression of the evidence s/he considered which supports the result, but also some indication of the evidence which was

rejected." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981) (remanding case back to Secretary of Health and Human Services where ALJ failed to explain implicit rejection of expert medical testimony that was probative and supportive of disability claimant's position). The Third Circuit has recognized that "there is a particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record." Id. at 706. The court reviews de novo the portions of the Magistrate Judge's Report and Recommendation to which objections are filed. 28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

To receive disability insurance benefits, a claimant must show that he or she is unable to:

> engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . . [The impairment must be so severe that the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. §§ 423(d)(1)(A) & (d)(2)(A).[1]

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[1] An ALJ considering a claim for disability insurance benefits undertakes the five-step sequential evaluation of disability claims set forth in 20 C.F.R. § 404.1520. Under Step

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In her Objections to the Magistrate Judge's Report and Recommendation, Plaintiff requests that the court grant her motion for summary judgment or remand the case to the Appeals Council. Plaintiff asserts two principal grounds on which the Magistrate Judge's and the ALJ's findings are not supported by substantial evidence. First, Plaintiff asserts that the Magistrate Judge improperly reasoned that the ALJ's error in finding that Plaintiff had a high school education was harmless. Second, Plaintiff asserts that the vocational evidence submitted to the Appeals Council was new and material and requires a remand for its proper consideration. The court will review each argument separately.

The Magistrate Judge determined that the ALJ erroneously concluded that Plaintiff had a high school education. (R. 28.)

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[1](...continued)
One, if the claimant is working and the work constitutes substantial gainful activity, the ALJ must find that the claimant is not disabled regardless of medical condition, age, education or work experience. 20 C.F.R. § 404.1520(b). Under Step Two, the ALJ determines whether the claimant has a severe impairment which significantly limits his or her physical or mental ability to do basic work activity. 20 C.F.R. § 404.1520(c). Under Step Three, the ALJ must determine whether the claimant's impairment meets or equals the criteria for a listed impairment as set forth in 20 C.F.R. pt. 404, subpt. 4, Appendix 1. 20 C.F.R. § 404.1520(d). Under Step Four, if the ALJ finds that the claimant retains the residual functional capacity to perform past relevant work, the claimant will not be found to be disabled. 20 C.F.R. § 404.1520(e). Under Step Five, other factors, including the claimant's residual functional capacity, age, education and past work experience must be considered to determine if the claimant can perform other work in the national economy. 20 C.F.R. § 404.1520(f).

Plaintiff asserts that the Magistrate Judge improperly reasoned that this error was not material. Plaintiff testified that she did not have a high school diploma but that she had attended a trade school from which she received a certificate indicating that she had completed the twelfth grade. (R. 59, 111 & 135-37.) Plaintiff stated that before attending trade school, she attended a normal high school until she was 16 years old. (R. 136.)

The relevance of a person's acquiring a formal high school education is that it suggests the person's ability to perform semi-skilled through skilled work. See 20 C.F.R. §§ 404.1564(a) (stating that "[e]ducation is primarily used to mean formal schooling or other training which contributes to your ability to meet vocational requirements"). In this case, the ALJ did not conclude that Plaintiff could perform semi-skilled through skilled work. Rather, the ALJ limited Plaintiff's job base to unskilled work. Under the regulations, unskilled work is appropriate for one with a marginal education which generally corresponds to formal schooling at the sixth grade level or below. See 20 C.F.R. §§ 404.1564(b)(2) & 416.964(b)(2) (stating that "generally . . . formal schooling at a 6th grade level or less is a marginal education").[2] In addition to the fact that

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[2] The regulations state that marginal education means "ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs." 20 C.F.R. §§ 404.1564(b)(2) & 416.964(b)(2). In contrast, the lower educational level, illiteracy, means "the inability to read or write." Id. § §§ 404.1564(b)(1) & 416.964(b)(1). A person is

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Plaintiff attended normal school until she attended trade school at the age of 16, Plaintiff initially testified that she could perform simple adding and subtracting. (R. 79.)[3] Consequently, Plaintiff's formal schooling until the age of sixteen corresponds to at least the marginal level, which is consistent with the unskilled work the ALJ found she was capable of performing.[4] Thus, the case should not be remanded despite the ALJ's error in concluding that Plaintiff had a high school education.

Next, Plaintiff contends that, when reviewing the ALJ's decision, the Magistrate Judge erred in that she did not review the additional evidence Plaintiff submitted to the Appeals Council. Plaintiff asserts that the evidence submitted to the Appeals Council is new and material and requires a remand for its proper consideration.

Richard J. Baine, a Diplomate of the American Board of

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considered illiterate "if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name." Id. In general, "an illiterate person has had little or no formal schooling." Id.

[3] Plaintiff also testified that she had, in the past, gone shopping by herself and had given the store owner money and received change for her purchases. (R. 138.) Further, Plaintiff testified that she spends several hours a day reading the Bible, newspapers and magazines. (R. 148.)

[4] According to the regulations, "[u]nskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time." 20 C.F.R. §§ 404.1568(a) & 416.968(a).

Vocational Experts, submitted a report dated December 5, 1997, which rated Plaintiff's level of academic achievement below the third grade level. (R. 387.) Plaintiff raised this additional evidence before the Appeals Council when she sought review of the ALJ's decision. (R. 6.) Plaintiff asserted that the vocational aptitude test provided a basis for changing the ALJ's decision. (R. 6.) The Appeals Council considered Plaintiff's contentions and made the additional evidence part of the record. (R. 6-8.) However, on January 7, 1998, the Appeals Council determined that the additional evidence did not provide a basis for changing the ALJ's decision and declined Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. (R. 6.) Plaintiff asserts that the Magistrate Judge erred in that she did not review the additional evidence Plaintiff submitted to the Appeals Council when she reviewed the ALJ's decision. Plaintiff contends that the additional evidence requires a remand for its proper consideration.

The Third Circuit has developed standards for district court remands based upon what is asserted to be new evidence. Szubak v. Secretary of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984) (listing standards). First, the evidence must be new and not merely cumulative of what is already on the record. Id. Second, the evidence must be material, that is, relevant and probative, and there must be reasonable probability that it would

have changed the outcome of the Commissioner's determination. Id.[5] Finally, the plaintiff must demonstrate good cause for not having incorporated the evidence into the record earlier. Id.

In contrast, when "new and material" evidence is brought before the Appeals Council with the claimant's request for review, the Appeals Council "shall consider the additional evidence" and "shall evaluate the entire record including the new and material evidence submitted" in determining whether the ALJ's action, findings or conclusion is contrary to the weight of the evidence currently of record. 20 C.F.R. §§ 404.970(b) & 416.1470(b). Thus, there is no "good cause" requirement before the Appeals Council.[6]

Plaintiff essentially argues that just as there is no "good cause" requirement when the Appeals Council reviews additional evidence, there should be no such requirement when the court reviews evidence that was not presented to the ALJ but was presented to and accepted by the Appeals Council. Plaintiff asserts that, like the Appeals Council, the Magistrate Judge was required to consider Plaintiff's additional evidence when

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[5] The burden of demonstrating a reasonable probability of a different outcome is not great; more than a minimal showing is required but less than a preponderance is sufficient. Newhouse v. Heckler, 753 F.2d 283, 287 (3d Cir. 1985).

[6] In this case, the Appeals Council considered the vocational evaluation Plaintiff submitted, but determined that the additional evidence did not provide a basis for changing the ALJ's decision. (R. 6.)

reviewing the ALJ's decision, regardless of whether Plaintiff can demonstrate good cause for not having brought the evidence forward sooner.

In her Report and Recommendation, the Magistrate Judge declined to consider the vocational evidence as a basis for remand because Plaintiff did not demonstrate good cause for not having incorporated the evidence into the record earlier. The Magistrate Judge recognized that, under Szubak, a claimant must demonstrate good cause for not having incorporated evidence into the record before the district court may remand a case based upon what is asserted to be new evidence. Szubak, 745 F.2d at 833. The Magistrate Judge concluded that because Plaintiff failed to show good cause for not incorporating the evidence into the record earlier, the case should not be remanded. The court finds that the Magistrate Judge's conclusion is consistent with Szubak and Frankenfield v. Bowen, 861 F.2d 405 (3d Cir. 1988).[7]

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[7] The Third Circuit has not spoken directly on the issue. Nonetheless, the court, like the Magistrate Judge, finds guidance to support the conclusion that Szubak provides the governing law in the Third Circuit's decision in Frankenfield v. Bowen, 861 F.2d 405 (3d Cir. 1988). In Frankenfield, as in this case, new evidence that had not been presented to the ALJ was presented for the first time to the Appeals Council, and the Appeals Council accepted it. Id. at 408. Frankenfield cited Szubak and concluded that the case should be remanded so that the new evidence could be considered by the Commissioner. Id. Because Frankenfield relied on Szubak, the court, like the Magistrate Judge, concludes that Szubak provides the correct rule of law when the court reviews evidence that is presented for the first time to the Appeals Council. But see Vasquez v. Apfel,

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The Magistrate Judge noted that other Courts of Appeals would not follow this approach, and would not require a showing of good cause before considering evidence that was not presented to the ALJ but was submitted to the Appeals Council. See Perez v. Chater, 77 F.3d 41, 45 (2d Cir. 1996) (stating that "new evidence submitted to the Appeals Council following the ALJ's decision becomes part of the administrative record for judicial review when the Appeals Council denies review of the ALJ's decision"); O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994) (same); Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (same); Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir.1992) (same); Wilkins v. Secretary, Dep't of Health and Human Serv., 953 F.2d 93, 96 (4th Cir. 1991) (same).

However, other circuits will not consider evidence that was first submitted to the Appeals Council if the Appeals Council considered the evidence but declined to review the ALJ's decision. See Falge v. Apfel, 150 F.3d 1320, 1322-23 (11th Cir. 1998)(stating that when Appeals Council denies review, although evidence first presented to Appeals Council becomes part of record, court "will look only to the evidence actually presented

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[7](...continued)
No.CIV.A.97-2670, 1998 WL 966087, at *5 (E.D. Pa. Sept. 30, 1998) (stating that "[i]n the interest of justice, the district courts of this circuit have followed the practice of reviewing the record as a whole in deciding if the ALJ's decision, as the final decision of the Commissioner, is supported by substantial evidence") (citations omitted).

to the ALJ in determining whether the ALJ's decision is supported by substantial evidence"); Perkins v. Chater, 107 F.3d 1290, 1294 (7th Cir. 1997)(holding that where Appeals Council considers new evidence along with rest of record and denies review, court "will not review the Council's discretionary decision"); Eads v. Secretary, Dep't of Health and Human Servs., 983 F.2d 815, 817-18 (7th Cir. 1993) (stating that "the decision reviewed in the courts is the decision of the [ALJ]" and that to consider evidence not submitted to ALJ "would change [the court's] role from that of a reviewing court" to that of "factfinder"); Cotton v. Sullivan, 2 F.3d 692, 695-96 (6th Cir. 1993) (citing Eads).

Because the Third Circuit in Frankenfield relied on Szubak to determine whether a case should be remanded when new evidence is presented for the first time to the Appeals Council, the Magistrate Judge concluded that Szubak provides the correct rule of law. This court agrees. The court also finds the reasoning of the Sixth, Seventh and Eleventh Circuits persuasive. To conclude otherwise would change the court's role from that of a reviewing court to that of a factfinder.

Further, the court does not agree with Plaintiff's assertion that she "clearly met" the good cause requirement. (Pl.'s Objections at 6 n.1.) Plaintiff failed to provide good cause as to why she did not present the additional evidence to the ALJ, who had no opportunity to consider Mr. Baine's December 5, 1997

report, which was submitted eight months after her decision. At the hearing before the ALJ, the VE identified a job that Plaintiff could perform. This job required some level of arithmetic ability. Nonetheless, Plaintiff did not attempt to obtain an evaluation of her arithmetic or language ability before the ALJ's April 21, 1997 Decision. Yet, Plaintiff had several opportunities to expand the record prior to this Decision. Following the July 11, 1996 hearing, the ALJ left the record open for two more weeks so that Plaintiff could submit additional medical records. (R. 181.) The ALJ told Plaintiff that if she needed more time to submit further evidence, she should inform the ALJ. Id. On July 24, 1996, Plaintiff's former attorney requested that the ALJ subpoena additional medical records. (R. 373.) The ALJ issued a subpoena, and on September 6, 1996, after receiving the subpoenaed records, she offered Plaintiff another opportunity to submit additional evidence. (R. 375 & 381-82.) The ALJ again wrote Plaintiff's attorney on November 19, 1996, offering the opportunity to submit additional evidence. (R. 383-84.) Yet, Plaintiff failed to obtain an evaluation of her arithmetic and language ability from Mr. Baine prior to the ALJ's decision. The evaluation was not obtained until December 5, 1997, fifteen months after the July 16, 1996 hearing and eight months after the ALJ's April 21, 1997 Decision.

Plaintiff not only failed to bring the vocational evidence

to the ALJ's attention, but she also failed to provide any explanation as to why she did not bring the evidence to the ALJ. Plaintiff suggests that "good cause" is met because Plaintiff's current counsel "entered the case after the ALJ's decision." (Pl.'s Objections at 6 n.1.) However, courts have held that claimants must "exercise reasonable diligence to acquire and present to the Secretary all the evidence that might bear on their . . . claims." Cruz-Santos v. Callahan, No.CIV.A.97-439, 1998 WL 175936, at *3 (D.N.J. April 7, 1998) (citations omitted). Plaintiff was represented at the ALJ hearing. Plaintiff makes no issue of the sufficiency or diligence of her former counsel in obtaining evidence supporting her claim. The record indicates that Plaintiff and her original attorney exercised reasonable diligence in collecting evidence. The court is unpersuaded that good cause has been established. See Cruz-Santos, 1998 WL 175936, at *4 (finding that change of counsel does not establish good cause). Thus, Plaintiff has failed to demonstrate good cause.[8]

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[8] The court agrees with the reasoning in Alper v. Shalala that:

> [a]t some point in time, there must be a definite record upon which the Secretary can make a decision. If remands were permissible every time a party gathered new evidence which might affect the outcome of his or her case, no determinations would ever occur. In order to facilitate the speedy dispositions of meritorious claims, "new evidence" remands should be narrowly circumscribed.

Alper v. Shalala, CIV.A.94-5972, 1995 WL 141929, at *2 (E.D. Pa.
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The court finds that the Magistrate Judge properly applied Szubak's five step analysis, and properly concluded that Plaintiff failed to demonstrate good cause for not having incorporated the new evidence into the record earlier. Consequently, the court will not consider evidence that was not presented to the ALJ when reviewing the ALJ's decision.[9] Because there is no "good cause" as required by sentence six of 42 U.S.C. § 405(g), this case should not be remanded for the ALJ to consider Mr. Baine's December 5, 1997 report.

III. CONCLUSION

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[8](...continued)
March 27, 1995) (citations omitted). The purpose of the good cause limitation on district court remands for "new evidence" in Social Security cases is "to speed up the judicial process so that these cases would not just go on and on . . . ." Cruz-Santos, 1998 WL 175936, at *3 (citations omitted). As Szubak stated, a "claimant should generally be afforded only one fair opportunity to demonstrate eligibility for benefits under any one set of circumstances." Szubak, 745 F.2d at 834. In furtherance of these objectives, parties must "provide a logical reason [as to] why the proffered additional evidence was not, or could not have been, presented to the Secretary for inclusion in the record during the administrative proceedings." Cruz-Santos, 1998 WL 175936, at *3 (citations omitted). Plaintiff "cannot wait to obtain the information necessary to support [her] claim for benefits until after an adverse decision." Hoffman v. Shalala, CIV.A.94-2473, 1995 WL 290442, at *4 (E.D. Pa. May 10, 1995).

[9] The ALJ had no opportunity to consider Mr. Baine's report, therefore, this evidence cannot be used to argue that the Commissioner's final decision is not supported by substantial evidence. See Jones v. Sullivan, 954 F.2d 125, 128 (3d. Cir. 1991) (citing United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) ("a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body").

Based upon the foregoing reasons, the Magistrate Judge's Report and Recommendation shall be approved and adopted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHARON BINGHAM MATTHEWS	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH S. APFEL,	:	
Commissioner of the	:	
Social Security Administration	:	NO. 98-1125

ORDER

AND NOW, TO WIT, this day of December, 1999, upon consideration of plaintiff Sharon Bingham Matthews' and defendant Kenneth S. Apfel, Commissioner of the Social Security Administration's cross-motions for summary judgment, and after careful review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh and the Objections thereto, IT IS ORDERED that:

1. the Report and Recommendation is APPROVED and ADOPTED;
2. plaintiff Sharon Bingham Matthews' motion for summary judgment is DENIED; and
3. defendant Kenneth S. Apfel, Commissioner of the Social Security Administration's motion for summary judgment is GRANTED. Judgment is entered in favor of defendant Kenneth S. Apfel, Commissioner of the Social Security Administration and against plaintiff Sharon Bingham Matthews.

LOUIS C. BECHTLE, J.